United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1011, 75-1017

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS MCNAMARA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF for APPELLANT McNAMARA

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Issues Presented 1

Constitutional Provision and Statute Involved 2

Statement of the Case 3

Nature of the Case 4

Course of Proceedings 6

Statement of Facts 8

1. Thomas McNamara 9
2. Harry Goberman 10
3. June 1972 Confrontations 13
4. Interstate Commerce 14

Summary of Argument 14

ARGUMENT

POINT I

THE INTENT AND PURPOSE OF THE HOBBS ACT ARE NOT TO PUNISH IN FEDERAL COURT EVERY PERSON WHO MAY HAVE COMMITTED A STRICTLY LOCAL CRIME UNDER STATE LAW 16

History of Hobbs Act 17

Prior Cases 20

Misuse of Federal Power 24

PAGE

POINT II

PROSECUTION UNDER THE HOBBS ACT IN THIS CASE WAS UNCONSTITUTIONAL 27

POINT III

THE RECORD DOES NOT SUPPORT A CONVICTION FOR CONSPIRACY TO OBSTRUCT, DELAY AND AFFECT COMMERCE; THE FAILURE TO CHARGE THE JURY SPECIFICALLY AS TO GOBERMAN IS REVERSIBLE ERROR 31

Goberman's Testimony 31

No Agreement 32

Affectation of Interstate Commerce 34

Conclusion 38

APPENDIX

Letter to Denis E. Dillon from Richard G. Kleindienst dated November 26, 1969 ..... 1a

Letter to David J. Ritchie from Henry E. Petersen dated September 28, 1972 ..... 2a

TABLE OF AUTHORITIES

PAGE

Cases

Bianchi v. *United States,* 219 F.2d 182 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955) 20

Comm'r of Internal Revenue v. *Brown,* 380 U.S. 563 (1965) 23

Flora v. *United States,* 362 U.S. 145 (1960) 17

Harold Goberman v. *John McNamara et al.,* Index No. 9589/73 (Sup. Ct., Nassau County) 14

Gordon v. *United States,* 344 U.S. 414 (1953) 32

Gulf Oil Corp. v. *Copp Paving Co.,* 42 L.Ed. 2d 378 (1974) 37

HarMac Contractors Co. et al. v. *Thomas McNamara et al.,* Index No. 3306/73, Calendar No. H-1432 (Sup. Ct., Nassau County) 28

Helvering v. *Hammel,* 311 U.S. 504 (1941) 23

Hospital Building Co. v. *Trustees of The Rex Hospital,* —— F.2d —— (4th Cir., Feb. 18, 1975) 37

Hulahan v. *United States,* 214 F.2d 441 (8th Cir.), *cert. denied,* 348 U.S. 856 (1954) 20

Nick v. *United States,* 122 F.2d 660 (8th Cir.), *cert. denied,* 314 U.S. 687 (1941) 27

Olmstead v. *United States,* 277 U.S. 438 (1928) 24

People v. *Sommer,* 33 N.Y.2d 629 (1973) 11

Rewis v. *United States,* 401 U.S. 808 (1971) 16

PAGE

Sandello v. *Curran,* No. M 11-188 (S.D.N.Y., Feb. 27, 1975) 25, 26
Stirone v. *United States,* 361 U.S. 212 (1960) 21

United States v. *Alsondo,* 486 F.2d 1339 (2d Cir. 1973), *cert. granted sub nom. United States* v. *Feola,* 416 U.S. 935 (1974) 37
United States v. *Archer,* 486 F.2d 670 (2d Cir. 1973) 22, 30
United States v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972) 22
United States v. *Barone,* 467 F.2d 247 (2d Cir. 1972) 37
United States v. *Bass,* 404 U.S. 336 (1971) 16
United States v. *Brown,* No. 74 Cr. 867 MP (S.D.N.Y., Feb. 24, 1975) 25, 26
United States v. *Caldes,* 457 F.2d 74 (9th Cir. 1972) 22
United States v. *Crespino,* No. 74 Cr. 932 HFW (S.D. N.Y., Feb. 13, 1975) 25, 26
United States v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941) 36
United States v. *DeMasi,* 445 F.2d 251 (2d Cir.), *cert. denied,* 404 U.S. 882 (1971) 22
United States v. *Del Toro,* Nos. 74-2021, 74-2035 (2d Cir., Feb. 27, 1975) 16
United States v. *Enmons,* 410 U.S. 396 (1973) 19, 22
United States v. *Enmons,* 335 F. Supp. 641 (E.D. La. 1971) 19
United States v. *Floyd,* 228 F.2d 913 (7th Cir.), *cert. denied,* 351 U.S. 938 (1956) 20
United States v. *Green,* 246 F.2d 155 (7th Cir.), *cert. denied,* 355 U.S. 871 (1957) 20
United States v. *Jacobs,* 451 F.2d 530 (5th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) 21

PAGE

United States v. *Kemble,* 198 F.2d 889 (3d Cir.), *cert. denied,* 344 U.S. 893 (1952) 20
United States v. *Kramer,* 355 F.2d 891 (7th Cir.), *cert. granted in part, denied in part,* 384 U.S. 100 (1966) 21
United States v. *Local 807 of Int'l Bhd. of Teamsters,* 315 U.S. 521 (1942) 17
United States v. *Maze,* 414 U.S. 395 (1974) 22
United States v. *Partin,* 493 F.2d 750 (5th Cir. 1974) .. 32
United States v. *Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964) 21
United States v. *Sweeney,* 262 F.2d 272 (3d Cir. 1959) 21
United States v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970) 21
United States v. *Varlack,* 225 F.2d 665 (2d Cir. 1955) 20, 30, 37

Constitutions

U.S. Const. art. 1, § 8, cl. 2 29
U.S. Const. amend. X 1, 2, 15, 27

Statutes

N.Y. Penal Law § 155.05(e) 28
48 Stat. 979 § 2(a) 17
15 U.S.C. §§ 13(a), 14 and 18 37
18 U.S.C. § 415 36
18 U.S.C. § 1951 ..... *passim*
28 U.S.C. § 515 ..... 25, 26

PAGE

Other

W. E. Burger, *Annual Report on the State of the Judiciary* (Feb. 23, 1975) 3, 24
89 Cong. Rec. 3194-3230 (1943) 17, 18, 19
91 Cong. Rec. 11899-11922 (1945) 18, 19, 28, 30
N. Y. Times, April 7, 1974 25
N. Y. Times, March 11, 1975 24
VI Wigmore, Evidence § 1823 (3d ed. 1940) 32

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS McNAMARA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF for APPELLANT McNAMARA

Appellant Thomas McNamara appeals from a judgment of conviction in the United States District Court for the Eastern District of New York for conspiring to violate the Hobbs Act or federal anti-labor racketeering statute, 18 U.S.C. § 1951, after a trial before a jury and an able and experienced, but troubled, trial judge,* who repeatedly expressed his uneasiness with this case and who indicated that the case requires careful review by this Court.

Issues Presented

1. Whether the Hobbs Act gives Special United States Attorneys unlimited authority to prosecute in federal court any person who may have committed a strictly local crime under state law.

2. Whether prosecution under the Hobbs Act in this unusual case violated the Tenth Amendment to the Constitution of the United States.

* The Honorable John F. Dooling, Jr.

3. Whether the mere reliance of the government on the broad legal concept of affectation of interstate commerce and on the testimony of a single witness admittedly incapable of abiding by an oath is sufficient to sustain a conviction for conspiracy to affect commerce where it is not shown that any of the acts complained of were intended to or did, in fact, affect or relate to commerce.

Constitutional Provision and Statute Involved

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Hobbs Act states:

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person

or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction. . . .

Statement of the Case

This case is a most disturbing example of serious problems referred to both by Chief Justice Burger in his *Annual Report on the State of the Judiciary* delivered on February 23, 1975 to the American Bar Association and a report last year of a special subcommittee of the Department of Justice, problems which threaten to erode further any semblance of state jurisdiction over local criminal matters and to subvert the administration of justice.

Nature of the Case

Appellant Thomas McNamara is a 62-year old successful small businessman in Port Jefferson, New York with an heretofore unblemished record. Having held a General

Motors dealership for some 25 years, presently employing some 30-40 persons, he is held in very high regard in the community.

In 1971, Mr. McNamara decided to construct an automobile sales and service facility on a lot located at 5184 Nesconsett—Port Jefferson Highway. At the time this decision was reached, a similar facility was under construction for someone else in the vicinity of his lot. Quite naturally, Mr. McNamara was interested in the construction at the neighboring site, and one day, as fate would have it, he struck up a conversation at the site with one Harold ("Harry") Goberman, a man whom the Special United States Attorney would later characterize during colloquy at the trial herein as "probably one of the worst scoundrels in the world" [1], a characterization which is more than amply supported by the record. Goberman was at the site as a representative of his brother Allan, whose construction company was doing the building. Goberman apparently represented to Mr. McNamara that he was responsible for the progress of the construction, and when Mr. McNamara mentioned his intent to build a similar facility down the road, Goberman stated that he would do the job. Indeed, without formal authorization, Goberman soon moved some equipment to the McNamara lot and began razing the land. However, thereafter on February 24, 1972, a formal AIA contract[2] was, in fact, entered into with HarMac Contractors Co., Inc., which later proved to be essentially nothing more than another of the many aliases of Harry Goberman.[3]

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[1] Appendix for Appellant McNamara [hereinafter cited as "McA"], p. 1527a.

[2] Government's Exhibit 11.

[3] Indeed, at trial, Goberman could not even recall on his own the exact name of his "company." *See* McA, p. 378a. When, on February 4, 1972, he proposed to Mr. McNamara entering into a contract, he did so on the letterhead of his brother's firm, Lenal Construction Co., Inc. *See* Defendant McNamara's Exhibit P, McA, p. 665a.

Goberman's criminal ways and his inability to construct the facility in the desired manner soon became known to Mr. McNamara. Threats and altercations occurred. On June 24, 1972, after the Town of Brookhaven Building Department Inspector had "posted" the premises for building code violations, Mr. McNamara sent Goberman a written notice of termination of the contract.[4] On June 28, 1972, Goberman executed a formal release.

On August 28, 1972, Goberman complained to the government that the contract release had been obtained as a result of extortionate activity. An investigation ensued which ultimately led to a presentation of the matter to a federal grand jury by Special United States Attorneys Denis E. Dillon and David J. Ritchie.

An indictment (73 Cr. 442) was returned on May 2, 1973, naming as defendants Mr. McNamara, his son John and Messrs. John DeLiso, Alphonse [M.] Merolla, Angelo Merolla and Rocco Merolla and alleging a conspiracy to violate the Hobbs Act based on the following allegations:

> . . . the defendant JOHN DE LISO, the defendant JOHN MCNAMARA, the defendant THOMAS MCNAMARA, the defendant ALPHONSE MEROLLA, the defendant ANGELO MEROLLA, and the defendant ROCCO MEROLLA, and other co-conspirators would obtain the property of the HarMac Contracting Corporation and of Harold Goberman, to wit, 1) the sum of $1300 which was the property of HarMac Contracting Corporation; 2) a trailer-type vehicle, which was the property of Harold Goberman and was utilized in the construction of the building mentioned in paragraph one; 3) a contract release, which was executed by Harold Goberman on June 28, 1972 which released the defendant THOMAS MCNAMARA and McNamara Re New Cars, Incorpo-

[4] *See* Defendant McNamara's Exhibits D and AQ, McA, pp. 33a, 31a.

rated from contractual obligations in excess of $25,000 for a consideration of $25,000 and; 4) other goods and services as requested by the defendant THOMAS McNAMARA, which were not contractually required; all of which property was to obe [*sic*] obtained with the consent of Harold Goberman and of HarMac Contracting Corporation, such consent to be induced by the wrongful use of physical violence and the threat of physical injury and damage to the person and property of Harold Goberman and of the HarMac Contracting Corporation, by the said defendants and co-conspirators, unless and until the said HarMac Contracting Corporation and Harold Goberman, gave such properties to the defendant THOMAS McNAMARA and McNamara Re New Cars, Incorporated. McA, pp. 16a-17a.

Course of Proceedings

The case was set for trial on January 7, 1974, and it commenced on that date as against all six named defendants. On January 24, 1974, the jury returned verdicts of not guilty with regard to defendants Angelo and Rocco Merolla. A mistrial was declared with regard to the defendant McNamaras and defendants DeLiso and Alphonse M. Merolla.

In September, 1974, a motion to dismiss the indictment for lack of federal jurisdiction was filed on behalf of Thomas McNamara,[5] with the other remaining defendants joining in the motion. A hearing was held on September 20, 1974, at which time Judge Dooling repeatedly questioned the application of the Hobbs Act in this case.[6] Indeed, at one point he stated that "*some of the cases under the Hobbs Act have . . . attenuated the commerce connection danger-*

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[5] *See generally* McA, pp. 20a-34a.

[6] *See, e.g., id.* at 69a-70a, 92a-93a, 98a, 101a-07a, 142a.

ously." McA, p. 96a. Nevertheless, the court denied the motion to dismiss the indictment. A Memorandum and Order to this effect was filed on September 30, 1974. It read, in part, as follows:

> Here, the charge is conspiracy to obstruct, delay and affect commerce and the movement of articles in commerce by extortion, *i.e.*, by obtaining property with consent but consent to be induced by wrongful use of violence and threats of injury to person and property. . . . *The conspiracy was not aimed at commerce*: no one conspired to hold up interstate shipments until HarMac was ready to release its contract rights, surrender its trailer, and pay over $1,300. In some sense what was done (if done as Mr. Goberman testified) did "affect" commerce, but affected it at one remove at least if not at the second remove. Is that enough today? The thinking in *Maze* and *Archer* suggests that the *decided cases under Section 1951 require serious re-examination.*
>
> While the commerce motion must be denied on the ground made, the broader commerce question remains open. McA, pp. 112a-113a (emphasis added; complete citations to the *Maze* and *Archer* decisions, *supra*, p. 22).

The case was called for trial on October 7, 1974, at which time Judge Dooling again expressed his serious misgivings about the case being an appropriate prosecution under the Hobbs Act,[7] a simple conspiracy case at that. *Cf.* McA, pp. 141a-42a. Nevertheless, the court stated: "I cannot dismiss this Indictment if the Government wishes to proceed."[8] At this point, just prior to bringing veniremen into the courtroom, the government stated it needed a

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[7] *See, e.g., id.* at 138a-39a, 146a.

[8] *Id.* at p. 148a. Judge Dooling realized that the chances that the government would not be able to prove some form of interstate commerce were "so slight." *Id.* at p. 351a.

witness and moved to sever defendant John McNamara from the trial, to the surprise of the remaining defendants including, of course, his father, Mr. McNamara, and their attorneys.[9] The motion was granted.

A jury was impanelled, and trial commenced on October 8, 1974 against Mr. McNamara and defendants DeLiso, Alphonse M. Merolla and one Alphonse Merolla, who had been named as a defendant co-conspirator in a subsequent indictment (73 Cr. 1066) and whose case was consolidated for trial. On October 23, 1974, the jury returned a verdict of guilty as against Messrs. McNamara and Alphonse M. Merolla. Defendants DeLiso and Alphonse Merolla were acquitted.

On January 10, 1975, Mr. McNamara was sentenced to three years in prison, 33 months of which term was suspended,[10] and a fine of $5,000. Execution of the entire sentence was stayed pending appeal. *See* McA, p. 2339a.

Appellant McNamara's Notice of Appeal to this Court was filed on January 14, 1975.[11]

Statement of Facts

The unusual circumstances of this case justify very careful scrutiny of the entire record by this Court. What perhaps, at best, can be described as a clash of personalities on the part of two local businessmen and, at worst, the effectuation of a scheme to extort money from the successful, well-to-do businessman ended up with the United States of America, as represented by an obviously inexperi-

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[9] *See* McA, p. 174a.

[10] Defendant Alphonse M. Merolla had been sentenced to an identical prison term on January 3, 1975.

[11] *See* McA, pp. 14a, 2341a.

enced and zealous Special Attorney from the Organized Crime & Racketeering Section of the Department of Justice, championing the cause of "probably one of the worst scoundrels in the world" [12] to such an extent that he apparently even went so far as to tell the Probation Officer subsequent to trial that he considered the victimized businessman (McNamara) to be a "class oppressor." Presentence Report, p. 8 (Dec. 9, 1974).

The facts of this case do involve oppression—the type of oppression and imbalance which seriously undermines traditional American concepts of federalism and propriety. These facts, developed in a voluminous record, can essentially be subdivided into the following basic categories:

1. Thomas McNamara

Neither the Probation Report nor any evidence adduced at either of his two trials indicated that appellant was not "obviously a man of previous good reputation",[13] to quote Judge Dooling, a man with whom one could have a "wonderful business relationship" [14] over a period of 20 years, indeed, a man who was characterized as "very good" [15] and "conscientious" [16] by the sister-in-law and wife, respectively, of the purported victim of the crime complained of herein, Harry Goberman.

On the other hand, Goberman spit in Mr. McNamara's face,[17] threw a punch at him,[18] threatened to hit him with a

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[12] *Supra* n. 1.

[13] McA, pp. 2326a-27a.

[14] *Id.* at 1557a.

[15] *Id.* at 1396a. *See id.* at 1078a.

[16] *Compare id.* at 1293a-94a *with* Defendant McNamara's Exhibit AO.

[17] *See* McA, pp. 1948a, 1956a.

[18] *See id.* at 1400a.

pipe,[19] threatened to bury him alive at the building site,[20] indeed, even threatened to kill him in the presence of local police officers.[21] In all, Goberman threatened Mr. McNamara some eleven times with various acts of violence, commencing on April 27, 1972. *See* McA, pp. 1499a-1505a.

Mr. McNamara went to a private attorney for assistance. *See, e.g., id.* at 1273a. He complained about Goberman to an Assistant District Attorney for Suffolk County[22] and to the police,[23] all to no avail. *See, e.g., id.* at 1507a-08a.

During the period March 4, 1972 through June 16, 1972, Mr. McNamara paid Goberman and HarMac a total of $219,023.80 in the form of personal checks which were introduced in evidence at trial as Defendant McNamara's Exhibits Y,[24] Z[25] and AD.[26]

2. Harry Goberman

The testimony of Goberman himself, upon which the government was so heavily committed,[27] clearly showed that he was no stranger to violence. He testified that he had been convicted of armed hijacking,[28] a federal crime which he had carried out some 14 years earlier with some five

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[19] *See id.* at 1969a.

[20] *See id.* at 1955a, 1959a, 1961a.

[21] *See id.* at 1725a, 1741a, 1965a-66a.

[22] *See id.* at 1113a.

[23] *See id.* at 1507a.

[24] *See id.* at 754a.

[25] *See id.* at 755a.

[26] This exhibit contains 15 checks ranging in amount from $280 to $102,814.00. McA, pp. 764a-65a.

[27] *Cf.* McA, pp. 1187a-88a.

[28] *See id.* at 371a, 894a. Goberman also testified that he had been convicted in 1957 of grand larceny, a state crime. *See id.*

other people and an automatic weapon.[29] Goberman further testified as to his possession of other firearms and that he had been involved in at least one shoot-out in his lifetime. *See id.* at 524a-29a.

Goberman also was no stranger to murder. Judge Dooling read a prepared statement to the jury regarding Goberman's role in the 1970 murder case in Suffolk County of *People* v. *Sommer* to the effect that Goberman and Sommer had conspired to bring about the death of a third person in order to collect that person's life insurance and that that person was thereafter killed, albeit purportedly not under the precise circumstances Goberman had envisioned. *See generally id.* at 492a-501a. The statement further indicated that after the murder, Goberman got in touch with the police, obtained a grant of immunity and gave testimony which was used against co-conspirator Sommer.[30]

The memorandum of the New York Court of Appeals, 33 N.Y.2d 629 (1973), affirming Sommer's conviction, states, in pertinent part:

> . . . One Harold Goberman, who had been granted immunity from prosecution, testified that he had had conversations with defendant concerning arrangements for killing Silver in order to collect the proceeds of a life insurance policy; that an arrangement was made between himself and defendant to kill Silver on May 17 by running over him in a stolen automobile to be provided by Goberman, and that he, Goberman, had decided not to go through with the plan and never carried out his part of it. 33 N.Y.2d at 630.

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[29] *Compare* McA, pp. 520-24a *with id.* at 603a.

[30] *See* McA, pp. 501a-02a. During the spring of 1972, the police were apparently still investigating Goberman's role in the murder, and Mr. McNamara had been made aware of this. *See id.* at 1310a.

Goberman testified to the use of a number of aliases, including Frank Master, Harry Masters, Harry Masterson, Russell Lambert, Jack Slade, Harry Goberman and Harry Goldman.[31] At the time of trial, he held an FAA pilot's license in the name of Harry Masterson which he obtained by swearing he had not been convicted of any crime, when, in fact, he had been convicted of two.[32] He apparently also possessed several Social Security cards with different numbers.[33]

The testimony of Goberman, if it can be believed at all, indicates an attitude towards an oath dependent upon given circumstances and momentary whims. For example, while he testified that he considered an oath administered in open court to require his telling the truth[34], he did not necessarily consider the identical oath to be as binding in the grand jury room[35] or if he needed a job[36]. In other words, for him, there are "different kinds of Oaths." One can "lie elsewhere". McA, p. 717a. Thus, he lied about the state of his mental health, resulting in his being examined for two weeks in a state mental hospital, all so as to avoid a court appearance[37], and he lied on a New York City Department of Consumer Affairs license application made under oath.[38]

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[31] *See* McA, pp. 372a, 473a, 476a, 541a, 548a-64a, 561a, 655a-57a. *See also id.* at 544a.

[32] *See id.* at 372a, 567a. On June 28, 1972, he had an automobile driver's license, albeit expired, in the same name. *See id.* at 455a, 568a.

[33] *See* McA, pp. 478a, 479a, 565a, 566a. *See also id.* at 542a.

[34] *See, e.g., id.* at 884a.

[35] *Cf. id.* at 885a, 886a-87a.

[36] *See id.* at 484a.

[37] *See id.* at 608a.

[38] *See id.* at 476a, 484a-85a, 652a-56a.

3. June 1972 Confrontations

With regard to the overt acts complained of in paragraph 4 of the indictment, *supra,* pp. 5-6, Goberman testified that he went to Mr. McNamara's office at 102 Main Street in Port Jefferson on June 5, 1972; that the seven named defendants were in the office; that various persons in the office then physically abused him; and that he thereupon made out a check in the amount of $1,300 to Mr. McNamara and signed over to Mr. McNamara title to the house trailer[39] which was being used at the construction site for an office. *See generally id.* at 422a-35a. Goberman further testified that on June 28, 1972 he went to the apartment of Mr. McNamara's son, James, located at 102 Main Street; that John McNamara, defendant DeLiso and the four Merollas (but not Mr. McNamara) were in the apartment; that they beat him; and that he thereupon signed a contract release[40] and a receipt[41] for the sum of $25,000, whereupon he was beaten again. *See generally id.* at 436a-55a.

Vigorous cross-examination[42] failed to undermine the essence of Goberman's testimony as to what transpired on June 5 and June 28, although the record is anything but clear as to the exact nature, if any, of the physical abuse of Goberman. The alleged abuse is the subject of ongoing

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[39] Mr. McNamara had advanced Goberman $1,500 to purchase the trailer on March 15, 1972 [*see, e.g., id.* at 381a, 387a-88a] for neither Goberman nor HarMac ever had any funds of their own. *See, e.g., id.* at 724a.

[40] Government's Exhibit 16, read into the record, McA, pp. 445a-51a.

[41] Government's Exhibit 17, read into the record, McA, pp. 451a-52a.

[42] *See, e.g.,* McA, pp. 583a-89a, 603a-07a, 611a-14a, 616a-21a, 628a-49a, 729a-45a, 812a-34a.

civil proceedings brought by him against the defendants for some $1,600,000, encaptioned *Harold Goberman* v. *John McNamara et al.*, Index No. 9589/73 (Sup. Ct., Nassau County).[43]

4. Interstate Commerce

With regard to interstate commerce, evidence was adduced at trial to the effect that a Merkel Electric Company in Port Jefferson received an interstate shipment of electrical building materials on April 26, 1972 for installation at the McNamara construction site[44]; that interstate shipments of steel joists and roof decks were delivered to the site in April, 1972 per orders from Goberman's brother's firm, Lenal[45]; that overhead doors were installed at the project which have moved in interstate commerce[46]; and that the new automobiles Mr. McNamara deals in are assembled at factories in states other than New York[47].

Summary of Argument

The intent of Congress in enacting the Hobbs Act is unambiguous. It was to prevent labor union members from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. It was never intended to provide the federal government with grounds for pursuing matters of strictly local, state, or even private, concern.

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[43] *See, e.g.*, McA, p. 576a, Defendant McNamara's Exhibit V.

[44] *See* McA, p. 337a.

[45] *See id.* at 301a, 313a, 315a, 317a.

[46] *See id.* at 1685a.

[47] *See id.* at 1694a. However, no such vehicles were shipped to the site during the period of time in question. *See id.* at 1711a.

This case is a disturbing example of what can happen when the government distorts the intent and purpose of a necessarily broad criminal statute. The only safeguard against such gross misadministration of justice lies in this Court's holding the government to sufficiently specific standards of behavior and judgment. And whatever the specific standard for application of the Hobbs Act might be, based on its legislative history, prior precedent and even common sense and decency, the facts and circumstances of this case do not rise to that level which warrants federal intervention and remedy.

The Hobbs Act is clearly constitutional on its face, but the prosecution of Mr. McNamara, who was and is entangled in a simple, contractual dispute with Goberman, violated the Tenth Amendment. To the extent that this dispute flared into verbal and physical abuse on the part of the disputants, state law is competent to deal with the anti-social behavior, and extension of the labor racketeering statute in an attempt to punish such behavior not only serves no meaningful national purpose, it ignores the national policy underlying the Hobbs Act, as well as the much more basic national policy of federalism.

The law of this case is that, if a conspiracy did exist, it was not aimed at interstate commerce, as alleged in the indictment. There is no proof of the existence of an agreement, save the occurrence of the overt acts complained of, which were developed by the government through the testimony of a single witness, who admitted to lying under oath.

Under the circumstances, the trial court was required to charge specifically that the testimony of that witness is to be scrutinized with care, and failure to do so, which was the situation herein, leaves no alternative to a reversal of any conviction.

Furthermore, the guilty verdicts in this case should have been set aside in view of the restrictive nature of the government's proof as to the conspiracy which provided the jury with no choice but to either acquit or convict all of the defendants. This it did not do. Since it failed to convict all, it could not convict any.

ARGUMENT

POINT I

THE INTENT AND PURPOSE OF THE HOBBS ACT ARE NOT TO PUNISH IN FEDERAL COURT EVERY PERSON WHO MAY HAVE COMMITTED A STRICTLY LOCAL CRIME UNDER STATE LAW

This case represents an attempt on the part of the government to overextend grossly, and without furthering any important national policy, the purpose and application of the Hobbs Act.

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do" is language patently broad and ambiguous at the same time. While overbreadth of criminal statutes may be desirable and necessary policy, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass,* 404 U.S. 336, 347 (1971); *Rewis* v. *United States,* 401 U.S. 808, 812 (1971). This principle of law has had continuing support and application in this Court. In citing verbatim this principle in its unanimous opinion on February 27, 1975 in *United States* v. *Del Toro,* Docket Nos. 74-2021, 74-2035, this Court pointed out:

> It seems to us that a healthy regard for the federal system of divided powers . . . compels a close scrutiny. In discerning Congressional intent we may consider whether an expansive interpretation of the statute "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." Slip op., p. 1968.

Close scrutiny in this case reveals a very unambiguous intent on the part of Congress with regard to the enactment of 18 U.S.C. § 1951, an intent and purpose which require reversal of appellant McNamara's conviction and dismissal of the indictment.

History of Hobbs Act

The Supreme Court has stated that "frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation." *Flora* v. *United States,* 362 U.S. 145, 151 (1960).

The predecessor of the Hobbs Act, Section 2 of the Anti-Racketeering Act of 1934, proscribed, in connection with the interstate commerce, the exaction of valuable consideration by force, violence or coercion, "not including, however, the payment of wages by a bona-fide employer to a bona-fide employee." 48 Stat. 979 § 2(a). In 1942, the Supreme Court held in *United States* v. *Local 807 of Int'l Bhd. of Teamsters,* 315 U.S. 521, that the foregoing exception covered members of the Teamsters who, through the use of violence and threats at the New Jersey entrance to the Holland Tunnel, exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving the out-of-town trucks into New York City.

Congress's reaction to *Local 807* was swift and angry. *E.g.,* Congressman Hobbs:

> . . . the Supreme Court . . . has decided that no matter how much violence a union man might use in seeking employment, he could not be punished under the 1934 Anti-Racketeering Act. If he commits murder, or if he commits assault with a weapon, it is all right under the anti-racketeering law. 89 Cong. Rec. 3195 (1943).

Congressman Walter:

> . . . In my judgment, the decision was a bad one . . .
> Now, with the hope that my voice can be heard across the park, I want to state that it is the intention of the Committee on the Judiciary to enact legislation for one purpose, and one purpose alone, namely, to correct the unfortunate decision in the Local 807 case. 89 Cong. Rec. 3202 (1943).

Congressman Kefauver:

> There can be no justification for what took place . . . These farmers, or men driving farm trucks came in, and . . . they were shaken down for $8 or $9. 89 Cong. Rec. 3205 (1943).

Some of the remarks during debate two years later were even angrier. *See, e.g.,* the remarks of Congressman Fellows and Congressman Rivers, 91 Cong. Rec. 11907 and 11917 (1945).

Against this background, the anti-*labor* racketeering (or Hobbs) act, 18 U.S.C. § 1951, was enacted. Indeed, the Congressional debate in both 1943 and 1945 centered on whether or not Congressman Hobbs's bill was actually anti-*labor* as opposed to anti-labor *racketeering. See* 89 Cong. Rec. 3194-3230 *passim* (1943); 91 Cong. Rec. 11899-11922 *passim* (1945). This was in order, for as Congressman Fish stated at the outset of the debate on the bill in 1943:

> . . . Its purpose is to do away with extortion, robbery, and practices that should be unlawful that have been used in the past by some union organizations in New York City extorting or attempting to extort fees from helpless farmers before permitting them to drive their produce truck to market. 89 Cong. Rec. 3194 (1943).

Congressman Hancock explained at the start of the debate in 1945 that:

> . . . This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does. 91 Cong. Rec. 11900 (1945).

The Supreme Court has recently had occasion in *United States* v. *Enmons,* 410 U.S. 396 (1973), to review the legislative history and application of the Hobbs Act. Typically, the Court did so in the context of labor union activity, to be precise, violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands. The district court had dismissed an indictment for conspiracy to violate Section 1951, the defendants having been charged with the following acts in the furtherance of the conspiracy: firing high-powered rifles at three Gulf States Utilities Company transformers, draining oil from a company transformer and blowing up a transformer substation owned by the company. *See United States* v. *Enmons,* 335 F. Supp. 641 (E.D. La. 1971). The Supreme Court affirmed, flatly rejecting the government's contentions that the statutory language unambiguously and without qualification proscribes interference with commerce by extortion. *See* 410 U.S. at 399.

If the blowing up of the electric transformer substation and other acts of violence and sabotage by striking union

members did not violate the Hobbs Act, can it properly be said that Mr. McNamara's involvement in the obviously nonlabor, nonracketeering, noncommerce case at bar violated the intent and purpose of the Hobbs Act? We think not. Or is it any wonder that Judge Dooling at trial worried about the stretching herein of the Hobbs Act "beyond the expectations of Congress, and beyond its intendance"[48] or about what this Court's reaction to this case[49] would be on appeal? Again, we think not.

Prior Cases

The consistency with which the Hobbs Act has been applied against illegal practices of unions, national in scope, is evident in cases such as *United States* v. *Kemble,* 198 F.2d 889 (3d Cir.), *cert. denied,* 344 U.S. 893 (1952) (union demand that a nonunion truck driver who transported goods across state lines employ a helper at the union rate of $10 per day); *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir.), *cert. denied,* 348 U.S. 856 (1954) (union extortion of construction companies in connection with work performed at the St. Louis Airport); *Bianchi* v. *United States,* 219 F.2d 182 (8th Cir.), *cert. denied,* 349 U.S. 915 (1955) (union extortion in connection with removal of an abandoned pipeline, its shipment out-of-state and the installation of loops to an existing interstate pipeline); *United States* v. *Varlack,* 225 F.2d 665 (2d Cir. 1955) (union extortion in connection with the unloading of sugar from ships); *United States* v. *Floyd,* 228 F.2d 913 (7th Cir.), *cert. denied,* 351 U.S. 938 (1956) (union officials' extortion of contractors responsible for the installation of an interstate pipeline); *United States* v. *Green,* 246 F.2d 155 (7th Cir.), *cert. denied,* 355 U.S. 871 (1957) (union officials'

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[48] McA, p. 146a.

[49] *See id.* at 2294a.

extortion of payments for bogus work to be performed in connection with the repair of a flood control levee on the Mississippi River); *United States* v. *Sweeney,* 262 F.2d 272 (3d Cir. 1959) (union extortion of operators of interstate trucking lines).

In *Stirone* v. *United States,* 361 U.S. 212 (1960), the indictment charged that the defendant used his union position to threaten a supplier of ready-mixed concrete who had a contract to supply the materials to be used in construction of a steel plant. The Court concluded that the supplier's dependence on shipments of sand from other states to carry on his concrete business "entitled him to Hobbs Act protection against interruption or stoppage of his commerce in sand by extortion." 361 U.S. at 215. Cases decided subsequent to this decision include *United States* v. *Provenzano,* 334 F.2d 678 (3d Cir.), *cert. denied,* 379 U.S. 947 (1964) (union officials' extortion of a trucking company to avoid labor disruptions); *United States* v. *Kramer,* 355 F.2d 891 (7th Cir.), *cert. granted in part, denied in part,* 384 U.S. 100 (1966) (union extortion of a contractor engaged in the construction of a building which would house interstate communications equipment); *United States* v. *Jacobs,* 451 F.2d 530 (5th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972) (extortion of tour operator to obtain permit to operate interstate transportation facilities).

However, in recent years, the government has attempted in this Second Circuit, as in other circuits, to extend the application of the Hobbs Act into areas other than those related to labor racketeering. And it has met with success on occasion.[50] But, as Judge Dooling pointed out in his

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[50] *See, e.g., United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970) (extortion of refuse removal company to prevent it from soliciting customers of defen-

Memorandum and Order dated September 27, 1974 herein, this Court's decision in *United States* v. *Archer,* 486 F.2d 670 (2d Cir. 1973), and the Supreme Court's decision last year in *United States* v. *Maze,* 414 U.S. 395 (1974), suggest that some of the more recent cases under the Hobbs Act "require serious re-examination." *Supra* p. 7; McA, p. 113a.

In *Archer,* Judge Friendly, writing for a unanimous Court, reversing the conviction and dismissing the indictment, referred to "a grossly inflated conception of the role of the federal criminal law." 486 F.2d at 677. That is:

> . . . the . . . attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern. 486 F.2d at 672 (footnote omitted).

In *United States* v. *Caldes,* 457 F.2d 74, 75 (9th Cir. 1972), discussed with approval in *Evmons,* 410 U.S. at 409, a unanimous court reversed a Hobbs Act conviction involving "low level violence" and dismissed the indictment.

If ever there was an attempt to concoct a federal crime out of a purely local commercial dispute, it is the case at bar. Whatever the standard for application of the Hobbs Act might be, the facts and circumstances of this case do not meet that standard. This case neither involved union activity nor "organized crime" or "racketeering" as these terms

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dants); *United States* v. *DeMasi,* 445 F.2d 251 (2d Cir.), *cert. denied,* 404 U.S. 882 (1971) (attempt to gain control of a nightclub by force and violence); *United States* v. *Augello,* 451 F.2d 1167 (2d Cir. 1971), *cert. denied,* 405 U.S. 1070 (1972) (extortion of owner of a drive-in restaurant in Brooklyn).

are commonly used[51] nor any matter, punishment of which in federal court[52] would further an important federal policy.

When the appropriate federal statutory standard is not recognized by the government, the Supreme Court has stated:

> Unquestionably the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute." [53]

The fault for failure to recognize the appropriate standard in this case lies, of course, with the Special Attorney. He obviously overlooked the fact that:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may com-

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[51] Indeed, the only connection with "racketeering" the record establishes is that between the purported victim of the crime herein, Goberman, and a close friend of his. *See, e.g.*, McA, pp. 622a-26a, 729a, 779a.

[52] This is not to say, of course, that the actions complained of herein should necessarily go unpunished or, for that matter, that the mere bringing of the federal proceedings has not punished the participants severely.

[53] *Comm'r of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965), quoting from *Helvering* v. *Hammel*, 311 U.S. 504, 510-11 (1941).

> mit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.[54]

Misuse of Federal Power

Chief Justice Burger's recently released *Annual Report on the State of the Judiciary* reads, in pertinent part, as follows:

> Many of the problems of the courts are closely related to the quality and competence of the major official participants—the contending lawyers and the judges—and the standards of professional conduct that govern the courts.[55] . . .
>
> Th[e] increase in criminal trials and appeals generated not only a large increase in public defenders but also in prosecutors. . . .
>
> The standards for selection and tenure and compensation of these lawyers on whom the system of justice must depend should be made sufficiently attractive so that the federal courts will not continue to be used as a "bush league" facility to train trial lawyers for private practice.[56]

Perhaps what happened in the case at bar is another disturbing manifestation of the problems referred to by the Chief Justice. Indeed, a report prepared last year by a subcommittee of the United States Attorneys Advisory Committee to the Attorney General, and apparently critical of so-called "strike forces", contained the following commentary:

> The strike force, as any other governmental organization, tends to be acquisitive of jurisdiction and

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[54] *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

[55] W.E. Burger, Annual Report on the State of the Judiciary, p. 1 (Feb. 23, 1975). *See also* N.Y. Times, March 11, 1975, at 16, cols. 1-5.

[56] W.E. Burger, Annual Report on the State of the Judiciary, p. 3 (Feb. 23, 1975).

> powers and has had a great tendency to expand its investigations into areas which have been and quite competently still can be handled by individual investigative agencies.[57]

The Special Attorneys who presented the case at bar to the grand jury, namely, Messrs. Denis E. Dillon and David J. Ritchie, purported to be acting pursuant to letters of authority from duly authorized representatives of the Attorney General dated November 26, 1969 and September 28, 1972, respectively, copies of which are appended to this brief for this Court's consideration.

In this regard, in a recent,[58] thorough and instructive opinion by Judge Henry F. Werker in *United States* v. *Crespino,* Docket No. 74 Cr. 932 HFW (S.D.N.Y.), the court granted a motion to dismiss the indictment for violation of the Hobbs Act on the ground that the letter which purportedly authorized the Special Attorney of the Organized Crime & Racketeering Section who presented the matter to the grand jury to do so was not in compliance with 28 U.S.C. § 515. That is, the attorney "was not properly authorized to appear before the grand jury and, as a consequence, the indictment must be dismissed." *United States* v. *Crespino,* slip op., p. 2 (Feb. 13, 1975). The court concluded that the letter in question was not sufficiently specific to permit presentation of the Hobbs Act and other allegations to the grand jury.

On the other hand, in *United States* v. *Brown,* Docket No. 74 Cr. 867 MP (S.D.N.Y. Feb. 24, 1975), and *Sandello* v. *Curran,* Docket No. M 11-188 (S.D.N.Y. Feb. 27, 1975), the courts found the government attorneys' letters in ques-

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[57] N.Y. Times, April 7, 1974, at 1, cols. 1-2. In attempting to obtain a copy of the actual report from the Department of Justice, we were informed that it is confidential.

[58] Feb. 13, 1975.

tion to satisfy the requirements of 28 U.S.C. § 515, albeit in matters not involving the Hobbs Act.

The one principle that is consistent in the above cases, however, is that Congress intended to limit the Attorney General's appointment of special attorneys to special cases or cases of unusual importance for the country. *See, e.g., United States* v. *Crespino,* slip op., pp. 5, 10, 11; *United States* v. *Brown,* slip op., pp. 7-10; *Sandello* v. *Curran,* slip op., p. 5.

In the case at bar, the government can hardly be heard to argue that, in prosecuting Mr. McNamara (or championing the cause of one who had previous success in convincing prosecutors of his point of view[59]), it was pursuing a case of unusual importance or meaning for the United States of America. Then again, if, as Judge Werker suggests, letters commissioning Special Attorneys should be sufficiently specific, implicit therein is the requirement that such prosecutors abide by their specific authority.

Here, both prosecutors had apparent specific, *but limited* authority to pursue matters, *inter alia,* "relating to extortion in aid of racketeering (18 U.S.C. 1951)". While Goberman may well have extorted Mr. McNamara, and such extortion, for all the record reflects, may have been, at least colorably, in aid of racketeering, Goberman was not tried; Mr. McNamara was—who, under no stretch of the record or the imagination, can be said to have done whatever he did in aid of racketeering.

In short, the Special Attorneys responsible for the institution of these proceedings exceeded their authority, and the indictment can be dismissed on this ground, in addition to dismissing it on the basis that the acts complained of were not within the purview of the Hobbs Act.

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[59] *See, e.g., People* v. *Sommer, supra* p. 11.

POINT II

PROSECUTION UNDER THE HOBBS ACT IN THIS CASE WAS UNCONSTITUTIONAL

On its face, the Hobbs Act is clearly constitutional, and we do not argue otherwise. *See, e.g., Nick* v. *United States,* 122 F.2d 660 (8th Cir.), *cert. denied,* 314 U.S. 687 (1941). We do, however, argue that the prosecution herein under the Hobbs Act was unconstitutional in that, as applied to the actions of Mr. McNamara, it violated the Tenth Amendment.[60]

Mr. McNamara and Goberman entered into a contract to construct a building. Goberman soon began demanding money from Mr. McNamara, who paid and paid, but who soon realized that his money was not necessarily being spent for the building and that the project was not progressing in an acceptable manner. For example, subcontractors continuously complained that Goberman was not paying them, whereupon Mr. McNamara would approach Goberman for an explanation. Goberman would threaten Mr. McNamara to leave him alone and then demand still more money. *See, e.g.,* McA, pp. 1080a-81a. This phenomenon lasted for several months, essentially from March 4 through June 16, 1972.[61] On June 24, 1972, after the Town Inspector had "posted" the property and after it had become obvious that Goberman was incapable of completing the job, Mr. McNamara sent him a written notice of termination of the contract pursuant to Article 14.2.1, which provided for termination, among other reasons, upon failure

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[60] This position was asserted at trial on behalf of Mr. McNamara. *See* McA, p. 2064a.

[61] *See supra,* notes 24-26, McA, pp. 672a-73a.

to pay subcontractors.[62] In response thereto, on June 29, 1972—or the day after he was allegedly beaten—Goberman sent Mr. McNamara a written notice[63] regarding alleged failure to make timely payments.

Viewed in this light, the matter so inappropriately brought into federal court by the government was nothing more than a breach of contract dispute, albeit with very strong-willed parties thereto. Can it seriously be argued that this dispute belonged in the United States District Court? Obviously not. Is there any doubt that a dispute of this local nature belongs in a local state court? Obviously not. Indeed, an action is presently pending in the Supreme Court of the State of New York, County of Nassau, encaptioned *HarMac Contractors Co. et al.* v. *Thomas McNamara et al.*, Index No. 3306/73, Calendar No. H-1432.

Viewed from the perspective of the spitting on or punching of Mr. McNamara and the alleged punching of Goberman, the government cannot seriously argue that state law should not and does not cover this kind of anti-social conduct.[64] Nor can the government argue that, if there was extortion on the part of Mr. McNamara or, better, Goberman, it is not proscribed by state law. *See* N.Y. Penal Law § 155.05(e). In fact, the definition of "extortion" set forth in the Hobbs Act was taken from the New York statute. *See* 91 Cong. Rec. 11900 (1945).

The Tenth Amendment states that the powers not delegated to the federal government are reserved to the states.

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[62] *Compare* McA, p. 25a *with id.* at 31a.

[63] Defendant McNamara's Exhibit T, McA, p. 691a.

[64] The argument was made on behalf of Mr. McNamara at trial that all that was involved was simple assault. *See* McA, pp. 2026a-27a.

Congress has the power to regulate commerce among the several states. U.S. Const. art. I, § 8, cl. 2. The Constitution nowhere delegates to the federal government the power to settle disputes of the nature developed at trial herein. Indeed, if Mr. McNamara's conviction is not reversed, the important objections voiced by Congressman Resa during the debate on Congressman Hobbs's bill on December 12, 1945 will, at long last, have proven to be true. He said:

> Mr. Chairman, offenses against persons and property which the pending bill would make punishable are already punishable under existing laws of the several States. They can be prosecuted more effectively under the laws of the States than they could be under this bill if it became a law. No prosecution for robbery, extortion, physical violence, or the conspiracies or attempts mentioned in the bill could be successful in the absence of evidence that the crime charged obstructed, delayed or affected commerce or the movement of any article or commodity in commerce under the definition of commerce provided in the bill. An examination of the decisions of the courts will show that in many cases the proof of the fact which would be a condition to conviction under this bill would be difficult. No such impediment stands in the way of conviction under the applicable laws of the States.
>
> If we undertake to multiply offenses punishable under Federal laws which are also punishable under the laws of the States we shall have to multiply also the personnel and organization charged with the duty of prosecution. This is another instance of objectionable duplication by the Federal Government of the functions and activities of the States. It is objectionable because it destroys that efficiency and economy in government which can be achieved only by a sound and rational distribution and exercise of powers and

functions within the framework of the principles of our Constitution.

Sometime somehow government, both State and Federal, will have to be made more efficient. Sometime somehow its cost will have to be brought within the limits of the ability of the people and our economic system to sustain it. The enactment of this bill would be a step away from the achievement of these objectives.

For these reasons in addition to those which may be found in the provisions of the bill which are easily susceptible of harmful misinterpretation I find it necessary to vote against H.R. 32.[65]

So long as Congress was seeking at the time to punish and prevent the Teamsters from extorting tribute from midwestern farmers for the privilege of delivering their produce in New York City, there could be no quarrel with the constitutionality of the legislation. *See, e.g., United States* v. *Varlack, supra.* But the case at bar has gone too far afield of the constitutional basis of the Hobbs Act and represents an unwarranted and unconstitutional expansion of the federal criminal law, and hence a serious violation of the Tenth Amendment. For this reason, in addition to all the others presented herein, Mr. McNamara's conviction, which serves no compelling national purpose, must be reversed on the grounds of unconstitutionality.

In this regard, Judge Dooling correctly stated that this was a matter properly for consideration by this Court. *See* McA, p. 2326a.

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[65] 91 Cong. Rec. 11913 (1945). *See United States* v. *Archer,* 486 F.2d 670, 677-78 (2d Cir. 1973).

POINT III

THE RECORD DOES NOT SUPPORT A CONVICTION FOR CONSPIRACY TO OBSTRUCT, DELAY AND AFFECT COMMERCE; THE FAILURE TO CHARGE THE JURY SPECIFICALLY AS TO GOBERMAN IS REVERSIBLE ERROR

In this case, the government failed to prove the existence of any agreement among the defendants, to corroborate the inherently incredible testimony of Goberman with regard to the existence of any conspiracy and to prove that the conspiracy was aimed at obstructing, delaying and affecting commerce as alleged in paragraph 3 of the indictment.

Goberman's Testimony

At trial, Mr. McNamara's attorney moved to strike the testimony of Harold Goberman in toto on the grounds of spoilation of evidence[66] and his complete disregard for the oath:[67]

> In his own sworn testimony, the oath means nothing to this man. He has called different kinds of oaths for various occasions.
>
> To him the truth is absolutely meaningless. McA, p. 2065a.
>
> . . . [I]f there is a case here at all the case goes on the credibility of Harold Goberman. McA, p. 2066a.

Judge Dooling denied the motion. To have done so was reversible error, for:

> The oath is a special test or security . . . and because the oath cannot have efficacy without the exist-

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[66] Goberman testified that he had removed a number of his documents and records sought by the defendants to North Carolina. *See* McA, pp. 678a-79a.

[67] *See supra* p. 12.

> ence of a certain belief, the lack of that belief excludes the witness.[68]

Furthermore, where the government's case in a criminal prosecution rides on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny. *See Gordon* v. *United States,* 344 U.S. 414 (1953). Clearly, Goberman's testimony was all but the government's entire case here. Nevertheless, Judge Dooling made no attempt to instruct specifically the jury with regard to Goberman's serious criminal record and, more importantly, with regard to his indifference to oaths. This too was reversible error.

The closest the charge came to touching Goberman specifically was as follows:

> In considering the credibility of a witness you may take into account the fact that he has been previously convicted of a crime or crimes. You may also take into account evidence that a witness has admitted the commission of other acts that were in violation of the law. McA, p. 2268a.

The Fifth Circuit has recently held in a Hobbs Act case that, where the government relies on a key witness or two with admitted criminal records comparable to that of Goberman, "the trial court *must* charge that the testimony of that witness is to be scrutinized with care" and failure to do so "leaves no alternative to a new trial." *United States* v. *Partin,* 493 F.2d 750, 760 (5th Cir. 1974) (emphasis in original).

No Agreement

In summation, Special Attorney Ritchie stated to the jury:

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[68] VI Wigmore, Evidence § 1823 at 307 (3d ed. 1940).

> . . . The Judge will instruct you on the law as to conspiracy. He will instruct you that it need not be a formalized agreement. It doesn't have to be in writing. He will inform you a conspiracy can be inferred, inferred from the actions together of a number of people to a certain end. McA, pp. 2179a-80a.

Judge Dooling did, in fact, charge the jury to this effect. *See id.* at 2249a. The court proceeded to refer to the two "episodes" on June 5 and June 28, 1972, stating he did not understand that the government's evidence "would prove conspiracy apart from the evidence of the threats and acts of violence against Harold Goberman" on those dates. *Id.* at 2253a. This is our understanding of the evidence, as well.

In view of this, the jury's verdict was fatally flawed and should have been set aside. Goberman's testimony, summarized *supra,* pp. 13-14, was to the effect that he was physically abused by and/or in the presence of the seven defendants in Mr. McNamara's office on June 5th and that he was similarly abused by and/or in the presence of all of the defendants except Mr. McNamara in James McNamara's apartment on June 28th. If, as the prosecutor contended, and the record reveals, this testimony, and it alone, is the basis upon which the jury could determine the existence of a conspiracy, then the fact that this testimony did not vary materially with regard to individual defendants means that *all* must have been convicted or *all* acquitted. However, at the first trial, defendants Angelo and Rocco Merolla were acquitted. And, at the second trial, defendants DeLiso and Alphonse Merolla were acquitted. Thus, in the absence of any other, independent proof tending to link Messrs. Thomas McNamara and Alphonse M. Merolla, the jury's verdict was flawed and should have been set aside.

Affectation of Interstate Commerce

The record herein does not establish any delay, obstruction or affectation of commerce as alleged in the indictment on the part of Mr. McNamara.

The law of the case is as Judge Dooling stated it in his Memorandum and Order on September 27, 1974, to wit: "The conspiracy was not aimed at commerce." *Supra,* p. 7; McA, p. 113a. Thus, even if a conspiracy existed as a matter of fact, it was not aimed at affecting commerce, as charged, and therefore Mr. McNamara's conviction cannot stand.

The government's precise theory on the affectation of commerce involved was stated to the court as follows:

> By having Harold Goberman sign the contract release the defendants were taking a man out of the commerce in which he was at the time engaged, and that is I think by extortion, and I think that is precisely the type of affecting commerce.[69]

But this was not what was charged in paragraph 3 of the indictment,[70] nor does the evidence regarding movement "of articles and commodities"[71] adduced by the government and summarized above, p. 14, relate in any way to this trial theory. Furthermore, the evidence with regard to the alleged extortion is not connected in any way to the lamp posts delivered on April 26, 1972 or the steel joists or the overhead doors. And, of course, at the time of the alleged extortion of Goberman, the building was nowhere near the point of accommodating new automobiles.

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[69] McA, p. 1883a. This theory was stated again. *See id.* at 2031a. *Cf. id.* at 97a.

[70] *See* McA, p. 16a.

[71] *Id.*

Indeed, the logical inference to be drawn from the record is that removal of Goberman from the project accelerated its completion and thereby aided, rather than delayed (as alleged), the flow of interstate commerce. For example, witness Taibbi, HarMac's construction superintendent, testified as follows as to what he had been told about the confrontation on June 5, 1972:

> Q. What if anything did they say then, did this individual who identified himself as Al Merolla say?
>
> A. The individual who identified himself as Al Merolla said to me, "We can never get a hold of your boss, Harry Goberman," with slurs thrown in, "We know where you live." We own something to the effect—I or we have a 25% interest in this place, and he said "If *it's not done correctly,* and *if it's not done,* you know, *done on time,* needless to say, McNamara can't sell cars and make his money," and they in turn can't get their 25%. . . . McA, pp. 983a-84a (emphasis added).

On the other hand, Goberman's testimony on cross-examination reads as follows:

> Q. Now, on June 5th did any of the defendants in this case tell you in words or in substance that they wanted you off the job?
>
> A. No, sir, they did not.
>
> Q. They told you or someone told you that they wanted you to get off the job, didn't they?
>
> A. I was to do it their way.
>
> Q. As a matter of fact, after June 5th Mr. Thomas McNamara loaned you money to pay your payroll, didn't he?
>
> A. That is because he didn't have the requisitions—
>
> Q. Please answer my question—
>
> The Court: Just whether he did or did not.
>
> A. Yes, sir.

Q. And shortly after he gave you the money for your payroll, did he then not give you a check for $32,000 some-odd dollars?

A. That is correct.

Q. As a matter of fact, you had and your corporation had no financial resources for this job of any kind?

A. That is correct.

Q. And the monies that you received on the requisitions, you put into the bank account of HarMac?

A. That is correct.[72]

As a predicate to federal jurisdiction in the case at bar, the government was required to prove that Mr. McNamara conspired to interfere with interstate commerce or the movement of goods in interstate commerce. This principle has been consistently applied by this Court since it was first announced by Judge Learned Hand in *United States* v. *Crimmins,* 123 F.2d 271 (2d Cir. 1941). That case involved a prosecution for conspiracy to transport stolen securities in interstate commerce in violation of the National Stolen Property Act, 18 U.S.C. § 415. The government had proved that several of the defendants carried on a joint enterprise of disposing of stolen bonds in New York City—some of which were stolen in other states. Crimmins was a lawyer in Syracuse, and the government proved that, on several occasions, one of the New York City ringleaders went to Syracuse and sold him bonds under circumstances, which the court stated, "justified the jury in concluding, as they did, that he knew that they had been stolen." 123 F.2d at 272. However, the conspiracy conviction was dismissed because there was no evidence

[72] *Id.* at 723a-24a. What really got Goberman off the project was his own ineptitude, which resulted in the building inspector stopping work as a matter of law on June 21, 1972. His notice stated: "Do Not Continue With Construction or Use of Premises Under Penalty of Fine and Imprisonment or Both." *Id.* at 26a.

that Crimmins knew that the other defendants stole the bonds from other states. This Court held that there could not be a conspiracy to cause stolen securities to be transported in interstate commerce "unless it is understood to be a part of the project that they shall cross state lines." 123 F.2d at 273-74. *Accord*: *United States* v. *Alsondo*, 486 F.2d 1339 (2d Cir. 1973), *cert. granted sub nom. United States* v. *Feola*, 416 U.S. 935 (1974), involving conspiracy to assault federal narcotics agents, while the latter were engaged in performance of their official duties; *United States* v. *Barone*, 467 F.2d 247 (2d Cir. 1972), involving conspiracy to transmit wagering information in interstate commerce.[73] In both cases, this Court acknowledged the parameters of federal police power and that the prosecution of the conspiracy counts would have to be brought by state law enforcement officers or not brought at all.

Indeed, the Supreme Court has recently held that the "in commerce" provisions of 15 U.S.C. §§ 13(a), 14 and 18 are not sufficient to sustain federal jurisdiction over an antitrust action involving the production and use of asphaltic concrete to build federal interstate highways. *See Gulf Oil Corp.* v. *Copp Paving Co.*, 42 L.Ed.2d 378 (1974). *See also Hospital Building Co.* v. *Trustees of The Rex Hospital*, —— F.2d —— (4th Cir., Feb. 18, 1975).

In sum, the record in this case does not support the conviction of Mr. McNamara for conspiracy to obstruct, delay and affect commerce.

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[73] *But compare United States* v. *Varlack*, 225 F.2d 665 (2d Cir. 1955).

Conclusion

In view of the foregoing, it is respectfully submitted that the judgment of conviction of appellant Thomas McNamara appealed from should be reversed and the indictment dismissed.

Dated: New York, New York
March 14, 1975

Respectfully submitted,

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APPENDIX

November 26, 1969

Mr. Denis E. Dillon
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Dillon:

As an attorney and counselor at law, you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested; and in that connection you are specifically directed to file informations and to conduct in the Eastern District of New York and in any other judicial district where the jurisdiction thereof lies any kind of legal proceeding, civil or criminal including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.

The Department is informed that various persons, companies, corporations, firms, associations and organizations to the Department unknown, have violated in the Eastern District of New York and in other judicial districts the laws relating to extortion in aid of racketeering (18 U.S.C. 1951), travel and transportation in aid of racketeering (18 U.S.C. 1952), transmission of bets, wagers, and related information by wire communications (18 U.S.C. 1084), interstate transportation of wagering paraphernalia (18 U.S.C. 1953), perjury (18 U.S.C. 1621), mail fraud (18 U.S.C. 1341), fraud by wire (18 U.S.C. 1343), interstate transportation of stolen property (18 U.S.C. 2314), wire and radio communication (47 U.S.C. 203 and 501), internal revenue (26 U.S.C. 7201-7206) and other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Sincerely,

cc: Mrs. Robinson
Attorney File
Subject File
Extra

Richard G. Kleindienst
Deputy Attorney General

Assistant Attorney General
Criminal Division

Department of Justice
Washington 20530

September 28, 1972

Mr. David J. Ritchie
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Ritchie:

As an attorney and counselor at law you are hereby specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the case or cases growing out of the transactions hereinafter mentioned in which the Government is interested. In that connection you are specifically directed to file informations and to conduct in the Eastern District of New York and in any other judicial district where the jurisdiction thereof lies any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct.

The Department is informed that various persons, companies, corporations, firms, associations, and organizations to the Department unknown have violated in the above-named district and in other judicial districts the laws relating to extortion in aid of racketeering (18 U.S.C. 1951), embezzlement of union funds (29 U.S.C. 501(c)) and the funds of welfare and pension plans (18 U.S.C. 664), payments by employers to their employees and to officials of labor organizations (29 U.S.C. 186), the filing of reports and the maintenance of records by unions and union officials (29 U.S.C. 439), deprivation of the rights of a union member by force (29 U.S.C. 530), obstruction of justice (18 U.S.C. 1503), obstruction of criminal investigations (18 U.S.C. 1510), obstruction of state or local law enforcement (18 U.S.C. 1511), travel and transportation in aid of racketeering (18 U.S.C. 1952), transmission of bets, wagers, and related information by wire communications (18 U.S.C. 1084), interstate transportation of wagering paraphernalia (18 U.S.C. 1953), prohibition of illegal gambling businesses (18 U.S.C. 1955), racketeer influenced and corrupt organizations (18 U.S.C. 1962), perjury (18 U.S.C. 1621), false declarations (18 U.S.C. 1623), mail fraud (18 U.S.C. 1341), fraud by wire (18 U.S.C. 1343), interstate transportation of stolen property (18 U.S.C. 2314), wire and radio communication (47 U.S.C. 203 and 501), internal revenue (26 U.S.C. 7201-7206), and other criminal laws of the United States and have conspired to commit all such offenses in violation of Section 371 of Title 18 of the United States Code.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division, Department of Justice.

Sincerely,

Henry E. Petersen

HENRY E. PETERSEN
Assistant Attorney General

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

Andrew J. Cusack being duly sworn, deposes and says that deponent is not a party to this action, is over 18 years of age and resides in the City of New York, State New York. On March 14 1975, deponent served two copies of the brief for Appellant McNamara

upon:

Robert Plaxico, Esq.
P. O. Box 14236
Washington, D.C. 20044

attorney(s) for party(s) in this action, at the address(es) designated by said attorney(s) for that purpose by:

MAIL [x] depositing a true copy(s) of the same securely enclosed in post-paid wrappers in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza, in the City and County of New York, directed to said attorney(s) at the address(es) set out under h is name(s); th at being the address(es) within the state designated by h im for that purpose in the preceding papers in this action.

LETTER DROP [ ] depositing a true copy of the same, enclosed in a sealed wrapper directed to said attorney(s), in the letter drop or box of, and accessible from without, of said attorney(s) office at the address(es) set out under the name; and that said office was not open at the time of service.

PERSON IN CHARGE [ ] delivering a copy of the same to and leaving the same with the person in charge of said office, said attorney(s) being absent therefrom at the time of said service.

Sworn to before me this
14 day of MARCH, 1975

Andrew J. Cusack

ALLAN J. MAYER
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-2592925 New York County
Term Expires March 30, 1977

INDEX NO..... YEAR 19.....

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF

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